No. 348 (20)

IN THE

Supreme Court of the United States

..... TERM, 1945

F. H. McGRAW & COMPANY, INC.,
Plaintiff-Petitioner,

v.

MILCOR STEEL CO. and JOHN T. D. BLACKBURN, INC.,
Defendants-Respondents,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI

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APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-2343

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Third Party Defendant-Petitioner.

Petition for a Writ of Certiorari

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, THE AETNA CASUALTY & SURETY COMPANY and F. H. MCGRAW & COMPANY, INC., respectfully pray for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit, entered on May 22, 1945, affirming a judgment entered by the United States District Court for the District of Connecticut in favor of the respondent, Milcor Steel Co., against the petitioners, for the sum of $6,372.51, with interest and costs (R., 619).*

* (R.) with a numeral indicates a page reference to the transcript of record in the Circuit Court of Appeals.

Summary Statement of Matters Involved

F. H. McGraw & Company, Inc., a New Jersey corporation, engaged in business as a general contractor and builder in the State of Connecticut, received a contract from the State of Connecticut, on or about August 16, 1938, for the general construction of the Continued Treatment Units, Fairfield State Hospital, at Newtown, Connecticut. In connection therewith, and as required by Connecticut Statutes, it filed a surety bond, executed by itself as principal and The Aetna Casualty & Surety Company as Surety (R., 110-112; 599-600).

On or about September 1, 1938, McGraw entered into a written subcontract with the Sherman Plastering Co. Inc., a New York company, whereby the latter company undertook to perform certain work and furnish certain materials to McGraw's Newtown project (R., 109; 600-601). Between July 1, 1939 and January 1, 1940, Sherman purchased materials from the Milcor Steel Co., a Delaware company, for delivery to the Newtown job. Thereafter, during the course of these proceedings, Milcor filed a claim against McGraw and Aetna, as principal and surety upon the statutory surety bond, claiming that it had not been paid for the materials delivered to the Newtown job, amounting to the sum of $6,372.51. Blackburn, from whom Sherman had also purchased materials, likewise filed a claim against the petitioners, under the circumstances described in a companion petition for a writ of certiorari which is being filed simultaneously herewith.

The petitioners contended in the Courts below that the conceded failure of Milcor and Blackburn to file, within sixty days after they had ceased to furnish materials and labor, a statement of their claim with the Commissioner of Public Works, as required by the laws and statutes of the State of Connecticut, was a complete bar to any

recovery against the petitioners upon the bond. To comprehend the full purport of their argument, the statutes under which the bond was executed must be briefly reviewed:

The surety company bond executed by McGraw as principal and the Aetna as surety was executed and delivered to the State of Connecticut on the 16th day of August, 1938 (R., 110-112). McGraw's contract with the State of Connecticut, specifically "made a part of this bond as though herein fully set forth" (R., 111-112) provided that: "Each and every provision of law and clause required by law to be inserted in this contract shall be deemed to be inserted herein and the contract shall be read and enforced as though it were included herein * * *" (R., 132). Wholly apart from that provision, it is conceded that the surety bond upon which Blackburn and Milcor have based their claims is governed by the Connecticut statutes requiring its issuance (*New Britain Lumber Co.* v. *American Surety Co.*, 113 Conn. 1).

Two statutes, existing side by side, dealt with surety company bonds furnished upon public construction contracts in 1938: the first, being Section 1594c of the 1935 Supplement to the General Statutes of Connecticut,* and

*"Sec. 1594c. *Bonds for protection of employees and material men on public structures.* Any officer or agent, * * * contracting in behalf of the state or any subdivision thereof for the construction, alteration, removal or repair of any public building, public road, public sewer or public bridge, if such contract shall exceed the sum of five hundred dollars, shall require from each contractor, as a condition precedent to the execution of a contract for any such construction, alteration, removal or repair, a bond with sufficient surety *and satisfactory to such officer or agent so contracting;* which bond shall be conditioned for the faithful execution of the contract according to its provisions and for the payment for all materials and labor used or employed in the execution of such contract. Any person, firm or corporation having any claim for materials and labor used or employed in the execution of such contract shall file, with the officers or agents contracting for any such construction, alteration, removal or repair, a statement of such claim within sixty days after he shall have ceased to furnish such materials or labor, which claim, if correct, shall be paid by such officers or agents, who shall recover the amount thereof with costs from the surety on such bond. The liability of the state or any subdivision thereof shall not exceed in the whole the amount it agreed to pay such contractor. If the total amount of such claims shall exceed such contract price, all such claims shall be paid pro rata."

the second being Section 540d(r) of the 1937 Supplement to the General Statutes.** Section 1594c, part of the Connecticut Law since 1917 (Chap. 118, Public Acts, 1917), is entitled: Bonds for protection of employees and material men on public structures." It provides in brief that: "*Any officer or agent* contracting in behalf of the state or any subdivision thereof for the *construction*, alteration, removal or repair of *any public building*, public road, public sewer or public bridge," shall require a surety company bond from each contractor, "which bond shall be conditioned for the faithful execution of the contract according to its provisions and for the payment of all materials and labor used or employed in the execution of such a contract." It further provides that "any person, firm or corporation having *any claim* for materials and labor used or employed in the execution of such contract shall file, *with the officers or agents contracting for any such construction*, alteration, removal or repair, *a statement of such claim within sixty days after he shall*

** Section 540d(r), 1937 Supp., General Statutes, thereafter designated as Section 786e(r), Chapt. 119a, 1939 Supp., General Statutes:

"Sureties for contracts. The bidder awarded the contract shall within ten days after the award thereof, substitute for the check accompanying his bid a surety performance bond for not less than fifty per cent nor more than one hundred per cent of the contract price, as shall have been prescribed by the commissioner in his invitation for bids, and an additional bond in the sum of not less than fifty per cent nor more than one hundred per cent of the contract price, as shall have been prescribed by the commissioner in his invitation for bids, conditioned that the contractor will promptly pay for all materials furnished and labor supplied or performed in the prosecution of the work, whether or not the material or labor enters into it and becomes a component part of the real asset. Such additional bond shall be held by the commissioner of public works for the use of each party who, whether as subcontractor or otherwise, shall have furnished material or supplies or performed labor in the prosecution of the work, as herein provided, and who has not been paid therefor. Such additional bond shall provide specifically that any such party may bring a suit thereon in the name of the state, prosecute the same to final judgment and have execution thereon for such sum or sums as may be justly due, provided the state shall not be liable to furnish counsel nor for the payment of any costs or expenses of any such suit. Each surety bond required by this subsection shall have as surety a surety company authorized to transact business in this state."

have ceased to furnish such materials or labor, which claim, if correct, shall be paid by such officers or agents, who shall recover the amount thereof, with costs from the surety on such bond".

Section 540d(r) of the 1937 Supplement to the General Statutes, thereafter designated as Section 786e(r), Chapter 119a, 1939 Supplement to the General Statutes, provides for a surety company bond, to be furnished to the Commissioner of Public Works, "conditioned that the contractor will promptly pay for all materials furnished and labor supplied or performed in the prosecution of the work, whether or not the material or labor enters into it and becomes a component part of the real asset." The bond shall be held by the Commissioner of Public Works "for the use of each party who, whether as sub-contractor or otherwise, shall have furnished material or supplies, or performed labor in the prosecution of the work as herein provided, and who has not been paid therefor". No specific reference, in so many words, is made to the necessity of serving a statement of claim by the party seeking to enforce the provisions of the bond.

The petitioners contended, in the Courts below, that the surety company bond prescribed by Section 786e(r), was governed by the broad and all-inclusive provisions of Section 1594c; that Milcor and Blackburn were required, as a condition precedent to their prosecution of a claim upon the bond, to file with the Commissioner of Public Works a statement of their claim *within sixty days* after they had ceased to furnish materials to the Newtown project; and that their conceded failure to do so was fatal to the claims which they asserted herein. In overruling the petitioners' contentions and striking out their affirmative defenses, the District Court held that a materialman was *not* required, under Section 1594c, to file a notice of claim within sixty days because "the sixty day

notice is *not* a condition precedent to suit against the obligors on a bond given under Section 1594c" (R., 83). The District Court also ruled that, in any event, Section 786e(r) "operates as *an implied repeal* of the 1935 act" (R., 85), and that the later statute prescribed a bond *without any limitation or restriction whatsoever,* so far as the service of a notice was concerned.

The Circuit Court of Appeals disagreed with the Trial Court's conclusion that the filing of a sixty day notice was not a condition precedent to a suit by a materialman against the principal and surety upon a bond furnished under Section 1594c (149 Fed. (2d) 301, 303-304). It held, nevertheless, that Section 1594c was impliedly repealed by Section 540d(r), in so far as contracts with the Department of Public Works was concerned (149 Fed. (2) at 303-304). It therefore affirmed the judgments entered by the Trial Court against the petitioners in favor of Milcor and Blackburn.

The Issue Presented by This Petition

The within petition squarely presents the following issue:

(1) Since the bond required by Section 540d does not mention, in so many words, the sixty day notice specified by Section 1594c, does the latter apply to a bond furnished to the Department of Public Works under Section 540d? Must a materialman or laborer, before he can invoke the provisions of such a bond, file the sixty day notice required by Section 1594c?

To comprehend the full purport of these queries, it is imperative to observe that the contrary contention sustained by the Courts below would permit a laborer or materialman under a contract with the Department of Public Works to file his claim at any time *within seven-*

teen years, since the bond, an instrument under seal, would be governed by the General Statute of Limitations covering such instruments (1930 Gen. Stat., Section 6003). In short, any surety company furnishing a bond for the construction of a public project under the jurisdiction of the Department of Public Works would be subjected to a liability thereon for seventeen years, requiring it to set aside reserves for that extraordinary period of time and making it impossible to close a public works job, although the work had been completed, accepted and used for many years.

The following unique situation would exist: All materialmen and laborers on private contracts would be required to file their claims within sixty days. Similarly, all materialmen and laborers on public jobs, other than those with the Department of Public Works, such as jobs for the State Highway Commission, the Airport Commission, the various Bridge Commissions, and every town, municipality and county within the state, would likewise be required to file their claims within sixty days. Set aside from those, *for no conceivable reason suggested by the Courts below,* would be the laborers and materialmen on contracts under the jurisdiction of the Department of Public Works, who would not be required to file any statement whatsoever and who would possess seventeen years within which to assert their claim, thereby affording neither the state, the surety company, nor the contractor any conceivable means of ascertaining outstanding and unpaid claims before they could close the job and release the surety from its obligation.

Reasons for the Allowance of the Writ

(1) The question presented by this petition is of immense importance to surety companies in the State of Connecticut, with respect to surety bonds written by them

under construction contracts with the Department of Public Works from 1937 to 1941. Under the decisions of the Courts below, surety companies will remain continuously liable for a period of seventeen years upon all bonds written between 1937 and 1941, without any conceivable way by which they can ascertain, prior to the expiration of the seventeen years, the full extent of their maximum liability. Each surety company will, therefore, be compelled to maintain reserves for the full amount of all their bonds written during those years throughout the entire period of seventeen years.

This consequence is supposedly due to the intention on the part of the Legislature to abrogate the necessity of any notice whatsoever when it enacted Section 786e(r) in 1937, covering the Department of Public Works, thereby differentiating between materialmen and laborers on public contracts with that Department and materialmen and laborers on all other public and private contracts who were, and always have been, required to file their claims within sixty days. No conceivable reason for the claimed differentiation has been suggested by the opinions of the District Court or the Circuit Court of Appeals. No rationale has been advanced to justify the Legislature's alleged intention of granting to materialmen and laborers on public jobs for the Department of Public Works seventeen years within which to assert their claims as against the sixty days prescribed for all other public and private projects.

We are aware of no other State or Federal statute which accords so unlimited a right to materialmen and laborers against sureties on public works bonds as the right which the Courts below have read into the Connecticut acts. The extraordinary nature of the conclusion adopted by the Courts below, resulting in the unexplained differentiation between one group of public works materi-

almen and laborers and all other groups of materialmen and laborers, public and private, within the same State, as well as the almost unlimited nature of the obligation imposed by the decisions of the Courts below upon principals and sureties, warrants a review of the Circuit Court's decision to determine whether, in fact, it has correctly determined and applied the law of the State of Connecticut.

Jurisdiction of the Court

This application is made under Section 240 of the Judicial Code (28 U.S.C.A. §347).

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket 147, and that said decree of the United States Circuit Court of Appeals for the Second Circuit, affirming the judgments obtained by the Milcor Steel Co. and John T. D. Blackburn, Inc., against the Petitioners, be reversed by this Honorable Court, and that Petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, August 16th, 1945.

F. H. MCGRAW & COMPANY, INC., and
THE AETNA CASUALTY & SURETY COMPANY,
By JOSEPH LOTTERMAN and
LOUIS A. TEPPER,
Counsel.